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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of MONROE F. MARSH, Deceased.	
MICHAEL A. WEISS, Individually and as Executor, etc.,	G052082
Petitioners and Appellants,	(Super. Ct. No. 30-2009-00331535)
v.	O P I N I O N
STEPHEN D. MARSH, as Executor, etc., et al.,	
Objectors and Respondents.	

Appeal from three orders of the Superior Court of Orange County, Kim R. Hubbard, Judge. Appeal from one order dismissed. Two orders affirmed.

Michael A. Weiss, in pro. per.; Law Office of Michael A. Weiss and Michael A. Weiss for Petitioners and Appellants.

Law Office of Stephen M. Magro and Stephen M. Magro for Objectors and Respondents.

Michael A. Weiss,[1] appearing individually and as the executor for the Estate of Jane L. Marsh, deceased (collectively appellants), appeal from the following three orders entered in proceedings concerning the administration of the Estate of Monroe F. Marsh, deceased: (1) dismissal of appellants' combined petitions; (2) denial of their motion to correct clerical errors and reopen hearings under Probate Code sections 850 and 11700[2] (motion to correct clerical errors); and (3) denial of an ex parte application for an order under section 10588. Stephen D. Marsh and Damon Marsh, the executors of Monroe's estate (collectively respondents), dispute appellants' claims. They have also filed motions to dismiss the appeals from the latter two rulings, and a request for judicial notice supporting dismissal of the third order.

We conclude respondents' motion to dismiss the appeal of the court's denial of the ex parte application and their request for judicial notice substantiating the motion have merit. The ex parte application sought to preclude respondents from selling real property held by the estate without court approval. Since a sale of the property *with* probate court approval has been completed, the appeal from the denial of the ex parte request is now moot. But we reject the motion to dismiss the appeal from the order denying the motion to correct clerical errors. That ruling effectively refused to consider a petition for a redetermination of appellants' interest in Monroe's assets and entitlement to distribution from his estate, and thus, is appealable under sections 1300, subdivision (k), and 1303, subdivision (f).

We further conclude appellants' arguments on the merits of the orders denying their combined petitions and motion to correct clerical errors are unpersuasive.

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[1] For clarity, we refer to the parties by their first names. No disrespect is intended.

[2] Unless otherwise indicated, all further statutory references are to the Probate Code.

We shall dismiss the appeal from the order denying appellants' ex parte application for an order under section 10588 and affirm the other two rulings.

FACTS AND PROCEDURAL BACKGROUND

This is the fifth appeal by appellants challenging adverse decisions entered in the administration of Monroe's estate. Our summary of the underlying proceedings is taken from the opinions issued in the four prior appeals.

In 2003, Monroe, then approximately 87 years of age, married 83-year-old Jane. By a prior marriage, Monroe had an adopted son, Stephen. Damon is Stephen's son. Michael, an attorney, is Jane's son by a prior marriage.

When Monroe and Jane married, Monroe owned a residence in Irvine and other assets. During the marriage, he segregated his property and kept all of the assets in his own name. Monroe obtained a reverse mortgage secured by a trust deed on his Irvine residence, and during his lifetime incurred over $620,000 in debt on it.

In 2007, Monroe executed a will. He left all of his property to Stephen and Stephen's children, subject to Jane's "right to occupy" the Irvine home and use its furnishings "for the balance of her life." The will contained a no-contest clause that, with certain exceptions, disinherited any beneficiary and anyone assisting a beneficiary who brought "any legal proceeding that attacks or contests this Will . . . or [who sought] to impair, nullify, void, or invalidate [it] or any of [its] provisions."

Monroe died in late 2009. Respondents filed a petition to probate his will and the court appointed them as executors of the estate.

Jane, represented by Michael, took the position she was entitled to all or a substantial portion of Monroe's assets. She filed two civil actions and a will contest that alleged she acquired Monroe's property upon his death under what appellants described as a marital partnership theory. In addition, with Michael's assistance, Jane paid off the outstanding balance on the reverse mortgage. Then, relying on the reconveyance of the trust deed securing the mortgage, she filed an affidavit of surviving spouse that asserted

she owned the Irvine residence. Shortly thereafter, Jane recorded a deed purporting to transfer title of the property to Michael.

Respondents successfully objected to these claims. They obtained dismissal of the civil actions and the will contest, and had Monroe's will admitted to probate. Additionally, respondents filed a section 850 petition, resulting in a declaration that neither Jane nor Michael had any interest in the Irvine residence. Subsequently, respondents brought a petition under section 11700, resulting in a finding Jane's actions in the estate's proceeding violated the no-contest clause in Monroe's will, thereby triggering a forfeiture of her rights under it.[3]

The foregoing rulings were the subjects of the four prior appeals. Save for the reversal of an order imposing sanctions on Jane for missing a case management conference, this court affirmed all of the decisions in respondents' favor.

In September 2014, appellants filed their combined petitions, the first of the three proceedings at issue in this appeal.

The combined petitions consist of four separate requests. The first, entitled spousal petition, alleged Jane, was the "heir, spouse, creditor, 3rd party trust deed beneficiary and . . . equitable owner . . . of property inventoried in" Monroe's estate. It claimed she owned all of the estate's assets, was entitled to recover one-half of the purported community funds she believed Monroe gave away without her consent during the marriage, and qualified for family support. Jane also complained respondents' inventory of the estate's assets did not include Monroe's Hawaii condominium.

The second request sought an allocation of community debts. Appellants alleged the basis for the request was respondents' rejection of Jane's creditor's claim and their purported refusal to provide truthful inventories and appraisals of Monroe's assets.

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[3] Appellants continued to live in the Irvine residence rent-free until finally served with a writ of possession in September 2014.

The third matter was a request by appellants to temporarily retain possession of the Irvine residence. The combined petitions' fourth request sought a declaration Michael owned the Irvine residence based on Jane's purported transfer of title to him after she paid off the reverse mortgage. Additionally, appellants' sought to have respondents surcharged for not recovering "all [of the] money" Monroe distributed "to them and their family members during [the] marriage."

Respondents demurred to the combined petitions primarily on the basis the requests were barred by the doctrine of res judicata. In support, they asked the trial court to take judicial notice of the allegations in appellants' pleadings and this court's prior appellate opinions. Respondents further noted California courts lack jurisdiction over the Hawaii condominium, and appellants' request to allocate community debts failed to identify any specific obligations. The trial court issued an order that granted respondents' request for judicial notice and sustained their demurrer without leave to amend. It later entered an order dismissing the combined petitions.

While the litigation over the combined petitions was pending, appellants filed their motion to correct clerical errors. Although difficult to follow, it appears the motion sought to reopen the hearings under section 850 concerning Jane's entitlement to an interest in the Irvine residence, and section 11700 on her rights as a beneficiary of Monroe's estate. In support, appellants cited to what they described as clerical errors in the probate court's prior rulings on the sections 850 and 11700 petitions. Respondents opposed the motion, again asking the probate court to take judicial notice of the prior appellate decisions on these matters and arguing the prior rulings were final. In addition, respondents claimed the purportedly inaccurate rulings did not constitute clerical errors. The trial court granted respondents' request for judicial notice and denied the motion, declaring the purported clerical errors cited by appellants were rulings of "a judicial nature [that were] fully litigated and upheld on appeal."

In May 2015, appellants filed an ex parte application under section 10588 that sought to prohibit respondents from selling the Irvine residence and distributing the sale proceeds to the estate's beneficiaries without court supervision. Respondents' opposition acknowledged they "intend to sell [the residence]," but "only pursuant to a petition for confirmation of sale . . . under the supervision of the Court." The trial court denied the ex parte application with prejudice. During the pendency of this appeal, respondents completed a court-approved sale of the residence.

DISCUSSION

1. The Motions to Dismiss the Appeal from the Second and Third Orders

Respondents have filed two motions, each seeking to dismiss the appeal from one of the orders specified in appellants' notice of appeal. The first motion asserts the denial of the motion to correct clerical errors is a nonappealable order. The second motion argues the denial of the ex parte application under section 10588 is moot.

As for the first dismissal motion, generally "appeals in probate matters are limited to those expressly provided by statute." (*Estate of Schechtman* (1955) 45 Cal.2d 50, 54.) However, "[a]n order is appealable, even if not mentioned in the Probate Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable." (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755.)

Appellants cite section 1303, subdivision (f), as a basis for their appeal of the order denying the motion to correct clerical errors. That statute authorizes an appeal from the granting or denial of an order under section 11700 "[d]etermining heirship, succession, entitlement, or the persons to whom distribution should be made." In addition, appellants' motion sought to reopen the proceedings on respondents' petition under section 850 that resulted in a judgment concluding appellants had no interest in Monroe's Irvine residence. This ruling is appealable under section 1300, subdivision (k). Since appellants' motion to correct clerical errors effectively sought to reopen the

proceedings on the section 11700 and 850 petitions, we conclude respondents' motion to dismiss the appeal from this ruling lacks merit and deny it.

The second motion to dismiss concerns the appeal from the order denying appellants' ex parte application "to restrain the personal representatives [of Monroe's estate] from selling the Irvine [residence] and distributing the proceeds to their family members without prior court supervision." In support of this motion, respondents also filed a request for judicial notice of documents memorializing the events concerning the residence's sale.

The attached exhibits reflect respondents served and filed of a notice for court approval of a proposed sale of the residence to a third party, which the probate court granted. Two days later, appellants filed a notice of appeal challenging the trial court's approval of the sale, which triggered a stay of the conveyance. (§ 1310, subd. (a) [appeal "stays the operation and effect of the judgment or order"].) Respondents filed an ex parte petition for judicial authorization to proceed with the sale under section 1310, subdivision (b), which allows the trial court to "direct the exercise of the powers of the fiduciary . . . as if no appeal were pending" "for the purpose of preventing injury or loss to a person or property." The trial court granted respondent's ex parte request, and the property was sold to the third party purchasers.

Respondents contend the appeal from the ex parte application filed under section 10588 is now moot because this court can no longer grant appellants the relief requested. We agree.

"'An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial right can be affected by the decision either way. . . . If all the questions involved in an appeal become moot, the appeal will be dismissed.'" (*Estate of Tierney* (1944) 63 Cal.App.2d 295, 299.)

In *First Federal Bank of California v. Fegen* (2005) 131 Cal.App.4th 798, plaintiff judgment creditor perfected a lien on defendant judgment debtor's residence and thereafter obtained an order authorizing a sale of the property. Defendant appealed but failed to post a bond to prohibit the sale from being completed, and the property was sold while the appeal was pending. The appellate court held the appeal was moot and dismissed it. "Because [the judgment debtor] did not post an undertaking, the Property was sold pursuant to the trial court's order. Consequently, this court cannot fashion any order which would have the effect of reversing the trial court's order of sale or otherwise preventing the sale of the Property, an event which has already occurred. . . . In short, the sale of the Property has rendered this appeal moot." (*Id.* at p. 801.)

This case presents an analogous situation. Appellants sought to restrain respondents from selling the Irvine residence and distributing the sale proceeds without court authorization. Respondents sold the property *with* court authorization to both complete the sale and to do so while the appeal was pending. Furthermore, distribution of the sale proceeds could not be immediately accomplished because respondents must file a petition for and receive authorization to do so. (§ 11600 et seq.) Any subsequent order allowing distribution of the estate's assets is itself an appealable ruling. (§ 1303, subd. (g).) Under these circumstances it is impossible for us to issue an order that would grant appellants any effective relief. Therefore, we grant respondents' motion to dismiss the appeal from the ex parte application filed under section 10588.

2. The Appeal's Merits

As with the prior appeals in this estate proceeding, appellants have submitted defective appellate briefs, which are difficult to comprehend and fail to comply with both the rules of court and the basic principles of appellate review.

The argument section of appellants' opening brief contains only two headings. One heading asserts the doctrine of res judicata does not apply in this case. The second heading challenges the probate court's reliance on that doctrine to deny the

combined petitions and motion to correct clerical errors. However, the discussion set forth under these headings largely consists of numbered paragraphs containing disjointed arguments for points that are never fully developed. No attempt is made to present arguments under headings separately addressing the orders listed in the notice of appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B) [opening brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].) To the extent appellants' arguments address other issues, we need not consider them. (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 160.)

On the merits, appellants' arguments merely attempt to relitigate the issues that have been previously rejected by earlier final rulings. Thus, the question before us is whether the trial court erred in relying on the doctrine of res judicata to deny appellants' combined petitions and motion to correct clerical errors. We conclude respondents' contention that the issues appellants now raise were previously litigated and the rulings rejecting their claims are now final has merit.

"'As generally understood, "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.'"'" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) The doctrine applies in probate proceedings. (*Kuchel v. Tolhurst* (1952) 39 Cal.2d 224, 228; *Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1534 (*Redfield*).)

Appellants claim res judicata is inapplicable because there has been no final judgment. This contention is incorrect. The administration of a decedent's estate can involve several "independent collateral proceedings," and the "final orders" entered in each such proceeding are independently appealable (§§ 1300 & 1303), and can be the basis for a res judicata defense. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 365, p. 988.)

At several points, appellants reassert the claim that Jane acquired title to Monroe's Irvine residence by paying off the reverse mortgage and subsequently received a reconveyance of title to the property. They challenge the scope and validity of the prior judgment entered in favor of respondents. Appellants also cite to paragraphs of the reverse mortgage's trust deed and to several sections of the Civil Code that govern deeds of trust to justify, on several theories, their ownership of the property.

As noted, this issue was resolved adversely to appellants when the trial court ruled for respondents on their section 850 petition. That decision was appealable (§ 1300, subd. (k)), this court subsequently affirmed it, and the decision is now res judicata. (*Redfield, supra,* 193 Cal.App.4th at p. 1534.)

Appellants argue res judicata does not apply where a party initially seeks the wrong remedy. They cite two cases for this proposition. The first, *Von Drachenfels v. Doolittle* (1888) 77 Cal. 295, involved an action to quiet title to a mining claim in which the unsuccessful plaintiff sought relief contrary to what he alleged in his complaint. (*Id.* at p. 296.) The case did not involve or even mention res judicata.

The second case, *O'Connor v. Irvine* (1887) 74 Cal. 435, held plaintiff assignee was not *collaterally estopped* from having a trust imposed on shares of stock in a mining corporation held in the name of defendant where the latter had previously prevailed in an action for ejectment brought by the assignor. Noting, "[e]quitable rights are not necessarily included in an action of ejectment" (*id.* at p. 441), the Supreme Court applied the general rule that "a judgment is conclusive between the parties in respect to

the matter directly adjudged" and only decides the issues "'actually and necessarily included therein.'" (*Ibid*.)

Unlike the present appeal, which concerns the res judicata doctrine's claim preclusion aspect, *O'Connor* involved collateral estoppel. In cases involving claim preclusion, "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.) Both Jane and Michael were parties to the section 850 proceeding. The probate court ruled neither appellant held "record title interest" in the Irvine residence or had "any interest in" the property. Thus, any new theories of recovery appellants now assert are barred.

Without citing to any portion of the appellate record, appellants refer to Jane's purported entitlement to be reimbursed for the amount she paid to discharge the reverse mortgage. In the prior appeals, we acknowledged the possibility Jane might have a right to reimbursement for that payment. However, appellants have apparently never filed a petition requesting reimbursement. Rather, they continue to insist, even in this appeal, that Jane's pay off of the reverse mortgage constitutes a basis for her claim that she owns the residence. As noted, the trial court previously rejected this assertion.

Another contention mentioned in appellants' opening brief is Jane's purported *Moore/Marsden* claim. (*In re Marriage of Moore* (1980) 28 Cal.3d 366 (*Moore*); *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426 (*Marsden*).) These cases recognize California law awards the community an interest in a spouse's separate real estate to the extent community funds are used to make payments on the property's purchase price. (*Moore, supra*, 28 Cal.3d at pp. 371-372; *Marsden, supra,*

130 Cal.App.3d at pp. 436-437.) A similar rule applies where community funds are used to improve one spouse's real property. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1426.)

But Jane's *Moore/Marsden* claim could have been asserted during the proceedings on respondents' section 850 petition. That statute authorizes the probate court to decide an action brought by a "personal representative or any interested person," "[w]here the decedent died in possession of, or holding title to, real or personal property, and the property *or some interest therein* is claimed to belong to another." (§ 850, subd. (a)(2)(C), italics added.) As noted the decision in that proceeding found Jane had *no interest* in Monroe's Irvine residence. Appellants cite *In re Marriage of Allen* (2002) 96 Cal.App.4th 497 (*Allen*), for the proposition a *Moore/Marsden* claim cannot be resolved by a petition under section 850. This contention amounts to a misstatement of the case. *Allen* involved a marital dissolution proceeding, not a decedent's estate, and the opinion does not even cite much less discuss section 850. (*Allen*, *supra*, 96 Cal.App.4th at p. 498.)

Similarly, we reject appellants' suggestion the trial court erred in failing to grant Jane a family allowance. A surviving spouse is entitled to an allowance. (§ 6540, subd. (a)(1).) But to obtain the allowance, Jane needed to file a petition requesting it. (§ 6541, subd. (a).) "In California, . . . it is well established that the right to a family allowance . . . is not a vested right and that nothing accrues before the order granting it." (*Estate of Blair* (1954) 42 Cal.2d 728, 733 (*Blair*).) At oral argument, Michael acknowledged appellants filed, but withdrew, a petition seeking a family allowance for Jane. Furthermore, Jane's right to a family allowance abated upon her death. (*Id.* at pp. 731-732; *Estate of Bachelder* (1899) 123 Cal. 466, 467 [dismissing appeal from order denying family allowance because right of widow does not survive to anyone].)

Appellants also attempt to reassert the claim the marital partnership theory supports a conclusion Jane acquired all of Monroe's assets upon his death. And they

repeat the corollary argument Monroe purportedly breached his fiduciary duties in managing community assets. Both of these issues were previously rejected by the trial court and affirmed on appeal. Thus, res judicata also bars these claims.

Finally, appellants mention a sanctions order the trial court issued in February 2015, which required Michael "to first submit any further pleadings in this case to the Supervising Judge of the Probate Department of the Orange County Superior Court for approval before they can be actually filed." This order is not mentioned in appellants' notice of appeal and thus not properly before us. Consequently, we decline to rule on the propriety of the sanctions order.

DISPOSITION

Respondents' request for judicial notice is granted. The motion to dismiss the appeal from the order denying appellants' ex parte application under section 10588 is granted and the appeal from that order is dismissed. The motion to dismiss the appeal from the order denying the motion to correct clerical errors is denied. The orders denying appellants' combined petitions and motion to correct clerical errors are affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.